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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LEE KRUEGER and MARY DELACOUR,
Petitioners,

vs.

DON FUHR,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. For the purposes of a Summary Judgment Motion, where the court must view all facts in the light most favorable to Appellants, was Respondent's use of deadly force to apprehend a suspect reasonable for the purposes of the Fourth Amendment protection against unreasonable seizures, where Respondent police officer had probable cause to believe the suspect had committed a dangerous felony, where the officer had an opportunity to otherwise apprehend the suspect, and where there is a dispute of fact as to whether the suspect was armed or whether the officer believed him to be armed?

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri, Southern Division, is not officially reported. It is, however, set out in Appendix B to this Petition. The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 991 F.2d 435. It is also set out in Appendix A to this Petition.

JURISDICTION

Petitioners initiated suit under 42 U.S.C. §1983 claiming that Respondent acted under color of state law to deprive their deceased son of his rights guaranteed by the Fourth Amendment

to the United States Constitution. This suit poses a Federal question and the District Court's jurisdiction was based on 28 U.S.C. §1331.

Petitioners initiated this suit in the United States District Court for the Western District of Missouri, Southern Division. Respondent filed a Motion for Summary Judgment and the District Court's Order overruling said Motion was filed on May 7, 1992. Respondent then filed a timely Motion to set aside and reconsider and the District Court's Order denying said Motion was filed on June 10, 1992. Respondent herein timely filed his Notice of Appeal, appealing that judgment to the United States Court of Appeals for the Eighth Circuit. On April 9, 1993, the Eighth Circuit handed down its opinion reversing and remanding the case to the District Court for entry of Summary Judgment in favor of Respondent. Petitioners timely filed a Petition for Rehearing and the Eighth Circuit entered its Order denying said Motion on June 1, 1993. This Court's jurisdiction is bestowed by 28 U.S.C. §1254 (I).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves 42 U.S.C. §1983 which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of the state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

It also involves the Fourth Amendment to the United States Constitution which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

Leroy Krueger was the son of Petitioners, Lee Krueger and Mary Delacour. On the evening of June 5, 1989, Leroy was visiting at the apartment of his cousin, Michael Allen Porter, in Springfield, Missouri. Leroy was wearing jeans and a black jersey bearing the number "12" in white letters. (T. at 126). At some point after midnight, Leroy and Mr. Porter left the apartment and went to a nearby convenience store where they arrived around 1:30 a.m. on June 6, 1989. (T. at 128). Mr. Porter entered the store and when he came back outside, Leroy was gone. Mr. Porter then walked back to his apartment. (T. at 130). At approximately 2:00 a.m. on June 6, 1989, Leroy apparently arrived at the American Laundry Service, also referred to as the Tri States Laundry Service, where Leroy had been previously employed. What happened at the laundry service is in dispute.

Leroy apparently encountered Robert Christy who was a supervisor at the laundry service. Mr. Christy states that Leroy threatened him with a knife as he exited his car. (T. at 220). After the encounter, Leroy walked to the 1000 block of Walnut where he stopped at a house and requested to use their phone. He called Mr. Porter and requested that Mr. Porter come get him. During this phone conversation, Leroy's version of the encounter at the laundry service was that Mr. Christy had chased him and hit him with his car. (T. at 131-132). One of the residents of the home where Leroy used the telephone was Christopher John Schmidt.

Mr. Schmidt states that Leroy handed him a knife. He threw the knife on the ground in the front yard and Leroy picked it up before leaving the house.

What is undisputed is that at approximately 2:18 a.m. the Springfield Police Department received a report that a male white subject, wearing black jeans and a black shirt with a number 12 on it, had pulled a knife on someone at Tri States Laundry and then ran away. This information was transmitted to police units in the field via the radio dispatching center in substantially the following form:

> [Dispatcher]: "Reference the assault at Tri State Laundry, 725 E. Trafficway. K-9 security is possibly in pursuit of this subject on foot, Walnut and John Q. Hammons, subject described as white/male wearing black shirt with number 12 on it and blue jeans, subject will be armed with a knife. 0227 hours." (T. at 195).

Respondent, Don Fuhr, is a police officer with the Springfield, Missouri Police Department and was on duty in the early morning of June 6, 1989. Officer Fuhr heard this information over his police radio. (T. at 22). As he responded in his patrol vehicle, Officer Fuhr heard several dispatch transmissions over his radio describing Leroy and indicating that he may be armed with a knife. (T. at 198-200). The final dispatch transmittal indicated that Leroy had been spotted in the 1000 block of East Walnut on the south side of the street. Officer Fuhr pulled onto East Walnut Street and as he drove westbound on Walnut Street, he observed an individual, later identified as Leroy Krueger, lying on the pavement on his stomach between two automobiles parked on the south side of the 1000 block of East Walnut Street. (T. at 23).

What happened next is in dispute, as the only evidence comes from the testimony of Officer Fuhr and physical and circumstantial evidence which is inconsistent therewith. It is certain,

however, that Leroy Krueger's life ended as he was struck twice in the back and once in the back of the head by bullets fired by Officer Fuhr from a distance of three to four yards behind him. Officer Fuhr's testimony is that as he exited his vehicle on the driver's side, he drew his service revolver. Leroy Krueger looked up at him and the officer identified himself as a police officer and yelled for Leroy to freeze. (T. at 44-45). The officer says that Leroy pushed himself up off the pavement using his hands and then turned and ran a few steps to the south and then eastward onto the sidewalk on the south side of East Walnut Street. As Leroy rose to his feet, Fuhr saw that he did not have a knife in his hands. (T. at 46). As Leroy ran away, Fuhr chased him across the street up on the public sidewalk along the north side of East Walnut Street. As Officer Fuhr closed in on him rapidly, he held his service revolver in his right hand. At this point it was inevitable that he was going to catch Leroy. (T. at 47-50).

After he had chased Leroy approximately 210 feet, Fuhr had closed to within three to four yards. At this point, the officer states that he saw Leroy reach to the area of his right hip, along the waistband or pocket, and withdraw what he believed to be a knife. (T. at 38). Fuhr testified at his deposition that, although there was a street light shining on the area, he did not see anything shiny, he saw a knife blade silhouetted against the sidewalk. He also testified that he heard "the common noise made like when you pull a hard object like a knife or a gun or anything from a scabbard." (T. at 38-39). Leroy continued to run at full speed. He did not slow down, he did not begin to turn on the officer, he did not drop or in any way throw a knife or any other weapon, he simply continued to run. At this point, although "it was obvious that [he] was going to catch him", Officer Fuhr raised his service revolver and fired four shots into the center mass of Leroy's body, striking him twice in the back and once at the base of the skull. (T. at 49-53).

Leroy fell forward, his body coming to rest on the sidewalk. There was no knife or any other type of weapon near his body and he apparently had been unarmed when he was shot to death. Officer Fuhr, in fact, did not examine Leroy's body to determine whether a knife was present and made no search for a knife or any other weapon at the scene. (T. at 67). Approximately 1 1/2 hours after the shooting, Police Officer Greg Schaeffer, who himself had been involved in a very similar shooting previously, found a knife with an exposed blade of approximately four inches in length laying in the bushes in front of the residence at 1021 East Walnut. The knife was 43 feet, 2 inches from where the right foot of the body of Leroy Krueger came to rest on the sidewalk. (T. at 204-205). The knife fit the description of the knife described by Mr. Schmidt but was not a knife that Mr. Porter had ever known Leroy to possess. (T. at 134).

Leroy's parents, Lee Krueger and Mary Delacour, filed a civil action in the Circuit Court of Greene County, Missouri, on November 29, 1989, against the City of Springfield and Don Fuhr, seeking monetary damage pursuant to 42 U.S.C. §1983. The state court action was removed to the United States District Court for the Western District of Missouri, Southern Division, where both Defendants moved for summary judgment on all §1983 claims asserted against them. In Officer Fuhr's motion for summary judgment, he addressed the merits of Plaintiffs claim and also asserted that he was entitled to summary judgment based upon qualified immunity. Initially the trial court entered an Order on May 7, 1992, overruling both Defendants motions for summary judgment, concluding that "both the distance that the knife was found from the body, and the fact that three bullets struck Krueger in the back, create factual issues regarding the question of excessive force, which makes the case inappropriate for summary judgment." (T. at 247).

Both Defendants then filed a joint motion to set aside and reconsider the District Court's Order denying Defendants mo-

tion for summary judgment. This time the trial court granted summary judgment on all claim against the City of Springfield, but denied Officer Fuhr's motion to set aside the Court's prior Order. (T. at 263-266). Fuhr then appealed the trial court's denial of the summary judgment motion to the Eighth Circuit Court of Appeals. Although the District Court did not specifically address Officer Fuhr's claim for qualified immunity, the Eighth Circuit interpreted their brief reference to the claim for qualified immunity followed by their blanket denial of the motion for summary judgment, as a denial of the claim for qualified immunity. Accordingly, the Eighth Circuit accepted jurisdiction from a denial of a summary judgment pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Once they had accepted jurisdiction, the Eighth Circuit proceeded to decide the case on its merits, never reaching the issue of qualified immunity. On April 9, 1993, the Eighth Circuit reversed and remanded the case to the District Court for entry of summary judgment on behalf of Officer Fuhr. In a decision that is replete with assumptions that Officer Fuhr did, in fact, believe that Leroy had pulled a knife, the Court determined that Officer Fuhr's actions were objectively reasonable for the purposes of the Fourth Amendment. Petitioners petitioned the Eighth Circuit for a rehearing of the case and on June 1, 1993, the Eighth Circuit entered its Order denying said petition.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals failed to consider all facts in a light most favorable to the non-moving party in an appeal from the denial of a motion for summary judgment.

The Court of Appeals recognized that since it was presented with a summary judgment motion, "the Court must determine whether any factual issues exist that may reasonably be resolved in favor of either party. . . . In making this determination, the Court must view the facts in the light most favorable to the non-moving party, giving such party the benefit of all reasonable inferences to be drawn from the facts." *Krueger v. Fuhr*, 991 F.2d 435, 438 (8th Cir. 1993). Furthermore, the Court acknowledged that their exists a dispute as to whether or not Leroy Krueger was armed at the time he was shot and whether he had committed any crime. *Id.* at 439.

However, in the body of its analysis, the Court of Appeals views these facts other than in the light most favorable to Petitioners. Specifically, the Court of Appeals assumed that "Leroy Krueger pulled, or seemed to pull, a knife from his waistband." *Id.* The Court also determined that "use of deadly force was necessary to prevent escape," *Id.* at 440, despite the fact that the officer's deposition testimony is replete with references to the fact that he was "gaining on" and about to catch Leroy at the time of the shooting. In fact, Officer Fuhr only contends that he resulted to deadly force to avoid being stabbed and never once indicates that he did so to prevent escape. (T. at 50).

Although Officer Fuhr testified that Leroy pulled a knife from his waistband, the record contains an abundance of evidence that is contradictory thereto. There was evidence available to the Court of Appeals that Leroy did not have a knife in his possession at the time he was being chased, (T. at 45); that the knife found

approximately 43 feet from his body was not the knife that had been given to him by Michael Allen Porter (T. at 134), that the knife was found approximately 1 1/2 hours after the shooting by an officer who himself had been involved in a similar shooting previously; (T. at 68-69); that Officer Fuhr never looked for a knife or any weapon on or near the body of Leroy Krueger after shooting him, (T. at 66-67); and that Officer Fuhr never observed Leroy throw or in any way dispose of a knife or any other weapon. (T. at 54).

All of these contradictory facts must be viewed in the light most favorable to the Petitioners, as the non-moving parties. Essentially, when this rule of construction is followed, the Court must presume that Leroy did not have a knife at the time he was shot, that the Officer could not reasonably have thought that a knife had been pulled, and that despite the fact that he was about to catch Leroy, Officer Fuhr fired four shots into his back. The explanation for the presence of a knife in the general, but not immediate area, some time after the shooting, is a question for a jury which cannot be presumed in the context of a motion for summary judgment. The ultimate issue in this case is whether or not Officer Fuhr acted reasonably within the context of the Fourth Amendment when he shot and killed Leroy Krueger. When the underlying facts discussed above are viewed in a light most favorable to Mr. Krueger and Ms. Delacour, it is clear that this ultimate fact is in dispute. Accordingly, summary judgment for Officer Fuhr is not appropriate.

II. The Court of Appeals erred in finding that their is no material fact in dispute as to whether or not Respondent police officer acted reasonably in using deadly force to stop the decedent from fleeing, where the officer had probable cause to believe the suspect had committed a dangerous felony, where the officer had an opportunity to otherwise apprehend the suspect, and where there is a dispute of fact as to whether the suspect was armed or whether the officer believed him to be armed.

This case involves a claim of excessive force by a police officer and is properly analyzed under the Fourth Amendment to the United States Constitution. The standard is one of "objective reasonableness". *Graham v. Connor*, 490 U.S. 386 (1989). Application of this standard to cases involving the use of deadly force by a police officer to apprehend a fleeing suspect, is governed by *Tennessee v. Garner*, 471 U.S. 1 (1985). The *Garner* case involved a police officer in pursuit of an unarmed, non-dangerous burglary suspect. As the suspect began to climb over a fence that would inevitably lead to his escape, the officer shot and killed him. In defending the §1983 action brought by the suspect's father, the officer relied on a Tennessee statute which authorized the use of deadly force any time a suspect continues to flee or forcibly resist after an officer expresses his intention to make an arrest.

The Court determined that the statute was invalid and began to analyze the case under the Fourth Amendment, declaring that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Garner*, 471 U.S. at 7. Determining the constitutionality of such a seizure requires the Court to "balance the nature and quality of the intrusion on the individuals Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id. citing U.S. v. Place*, 462 U.S. 696, 703 (1983). The Court then analyzed the

extent of the intrusion; declaring that "[the] intrusiveness of a seizure by means of deadly force is unmatched. The suspects fundamental interest in his own life need not be elaborated upon." *Id. at 9*. The competing government interest of effective law enforcement is not sufficient to justify the killing of non-violent suspects. "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Id. at 11*.

In *Garner*, the Court enunciated that it is not constitutionally unreasonable to prevent escape by deadly force; "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. The Court then set out two distinctive tests to determine when an officer has such probable cause. The first of these disjunctive tests is; "if the suspect threatens the officer with a weapon". The second situation when such probable cause exists is when "there is probable cause to believe that [a suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm" and deadly force is "necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* Clearly, the *Garner* test requires that a Court, in reviewing the use of deadly force by a police officer, to make factual determinations regarding each of the elements enunciated in the tests set forth above. *See Washington v. Newsom*, 977 F.2d 991, 994-995 (6th Cir. 1992). In the case at hand, the Court of Appeals erred in failing to make these factual determinations pursuant to Federal Rule of Civil Procedure 56(c), (*See discussion in section 1 of this petition*), and in determining certain crucial facts to be immaterial.

Of the four factual determinations required by the *Garner* test, two are not disputed. Petitioners concede that Officer Fuhr gave Leroy the feasible warnings and that he had probable cause to believe Leroy had committed a crime involving the threatened infliction of serious physical harm. Although there has been no

opportunity for a jury to assess the credibility of his testimony, Officer Fuhr's contention that he ordered Leroy to freeze is not contradicted by any other evidence. Additionally, although it is disputed whether or not Leroy had actually committed a crime or possessed a knife, it is certain that Officer Fuhr received radio transmittals describing Leroy, referring to his physical locations and stating that he was suspected of threatening someone with a knife. However, the existence of these facts do not make Fuhr's actions constitutionally reasonable as set out in *Garner*. The remaining necessary factual determinations; whether or not Leroy threatened the officer with a weapon and whether or not deadly force was necessary to prevent his escape, are in dispute.

Ignoring all of the factual evidence that exists to contradict the police officers contention that he believed Leroy to have pulled a knife, the Court of Appeals found that, based upon the existence of the probable cause discussed above, "[it] was objectively reasonable for Officer Fuhr to believe on the basis of this information he faced a serious and immediate danger of physical harm when Leroy Krueger pulled, or seemed to pull, a knife from his waistband." *Krueger v. Fuhr*, 991 F.2d 435, 439 (8th Cir. 1993). The Court of Appeals then proceeded to determine that all of the facts which could lead a reasonable fact finder to determine that Leroy was not armed at the time of shooting, were not material, because "[we] have already concluded that Fuhr's belief that he was facing an armed and dangerous suspect was objectively reasonable." *Id.*

Finally, the Court of Appeals reached the question of whether the use of deadly force was necessary to prevent escape. The Court again ignored the facts contradictory to Officer Fuhr's contention that he saw a weapon, and found that his use of deadly force was necessary to prevent escape because, "the Fourth Amendment does not require police officers to forego the use of deadly force to prevent their own death or serious physical injury whenever there is a possibility that another officer might later ap-

prehend the fleeing suspect." *Id. at 440.* This determination is made despite the existence of several other police officers in the immediate area and Fuhr's own testimony that he was three or four yards away from Leroy and would inevitably have caught him.

Essentially, the Court has determined that the existence of probable cause that the suspect has committed a crime involving the threatened infliction of physical harm establishes that the officer will have a reasonable belief that his life is in danger. This, in turn, establishes that use of deadly force will be necessary even if there are obvious other means of apprehending the suspect. This bootstrap analysis flies in the face of the Supreme Court's statement in *Garner* that the use of deadly force to stop a fleeing suspect under any circumstances, is constitutionally unreasonable. *See Garner*, 471 U.S. at 11. As a practical matter, the Court of Appeals decision means that any officer with probable cause to believe that he is on the trail of a suspect who has committed a crime involving the threatened infliction of harm, can ignore the absence of a weapon or any other threat by the suspect, and shoot the suspect dead. This standard would apply in situations where the suspect was on the verge of escape as well as situations where the suspect can easily be otherwise detained, including a situation of surrender.

In *Washington v. Newsom*, 977 F.2d 991 (6th Cir. 1992), the Sixth Circuit Court of Appeals addressed this issue more prudently. The case involved a police officer who was in pursuit of a vehicle whose occupants had used a "long black gun" to commit a series of robberies. The officers located the vehicle and observed the suspects in their car as they attempted to commit another armed robbery. The officer saw the passenger lean out of the vehicle and point a gun at the intended victim. The officers moved in on the vehicle and were fired at by its passenger. As gunfire was exchanged, the vehicle's driver exited and attempted to flee from the scene. As he was running, the Defendant police officer shot him numerous times. It was later determined that he was unarmed. The deceased suspect's family filed a §1983 action in

the United States District Court for the Eastern District of Michigan. The officer moved for summary judgment, which was denied by the District Court based on the existence of disputed facts which were material to the determination of the officers reasonableness. The officer appealed the denial of summary judgment based on qualified immunity, to the Sixth Circuit Court of Appeals.

There the Court recognized the summary judgment standard enunciated in Federal Rule of Civil Procedure 56(c), and the factual determinations required by the *Garner* test. *Id. at 993-995*. The Court determined that; "although we believe the answers to some of the questions we have posed may be favorable to the Defendants, . . . We may not decide as a matter of law the issue of whether a reasonable officer could have believed his actions were lawful." This determination is based on the Court's view of the factual disputes and its determination that, "[r]easonable finders of fact might disagree as to whether, at the time of the flight, an objective police officer should have perceived [the suspect] as 'unarmed' or 'non-dangerous', particularly in view of the number of police officers present." *Id. at 995*. Based upon the existence of factual disputes similar to those in the case at hand, the Sixth Circuit Court of Appeals affirmed the denial of the Defendant officer's motion for summary judgment and remanded the case to the District Court to proceed to trial. A similar disposition would be proper in this case. The facts which are in dispute, whether Leroy possessed a knife or Officer Fuhr could have reasonably believed that he pulled a knife, and whether or not the use of deadly force was necessary to apprehend Leroy, should be decided by a jury.

All of the elements of the tests set out in *Garner* must be properly analyzed before a Court of Appeals can determine whether or not a police officer's use of deadly force is reasonable. When a suspect threatens an officer with a weapon, the officer's safety is obviously in question making it reasonable for

that officer to use deadly force. Whether or not Leroy Krueger threatened Officer Fuhr with a weapon is in dispute. The test is not "when an officer reasonably believes he is threatened", but only when he "is threatened". However, the facts that exist; that Leroy did not have a knife or any weapon in his possession at the time Officer Fuhr saw him get up and start to run, the discrepancy in the identity of the knife, the location where a knife was eventually found, the prior history of the officer who found the knife, Officer Fuhr's lack of investigation or search for a weapon following the shooting, and the officer's vague testimony of how he saw and heard a knife, could lead a reasonable trier of fact to determine that he could not have reasonably believed Leroy Krueger to have been armed or dangerous at the time he killed him. Leroy Krueger's parents must be given the opportunity to have a jury make this determination.

Independent of the facts discussed previously, the fact that Leroy was shot in the back itself raises a genuine issue of material fact as to whether or not the officer was threatened with a weapon. *See Samples on behalf of Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988). Accordingly, the first prong of the *Garner* test has not been established.

When an officer has probable cause to believe a suspect has committed a crime involving the use or threatened use of violence, he also is reasonable in using deadly force to prevent that suspect from escaping. The rationale of the *Garner* court in establishing this test is that an officer who has such a probable cause is reasonable in determining that the suspect is dangerous and poses a threat to the officer or others if allowed to escape. Therefore, the officer should give warnings where feasible and then may use deadly force to prevent escape. However, such force can only be used if it is "necessary to prevent escape". The fact that the Supreme Court included the requirement of necessity is indicative that such necessity must exist independent of

the probable cause. It cannot be imputed from the probable cause as the Court of Appeals has attempted to do in the case at hand.

There is a genuine dispute as to whether or not deadly force was necessary to prevent Leroy's escape. In fact, Officer Fuhr asserts that he employed deadly force to protect himself from a weapon that he believed Leroy had drawn. At no time has Officer Fuhr contended that deadly force was necessary to prevent Leroy's escape. At the time of the shooting, the officer was three to four yards behind Leroy and was gaining rapidly. It was inevitable that he was going to catch Leroy. (T. at 50). *Compare Ryder v. City of Topeka*, 814 F.2d 1412, 1416 (10th Cir. 1987) (Deadly force necessary to prevent escape of suspect who was over fifty feet from the officer, and about to run around the building into a darkened residential area), and *Wright v. Whiddon*, 747 F.Supp. 694, 697 (M.D. GA. 1990) (Genuine dispute as to the need for deadly force to prevent escape of suspect who was unarmed and on the threshold of eluding immediate capture.). The above facts could lead a reasonable trier of fact to determine that deadly force was not necessary to prevent Leroy Krueger's escape and, accordingly, the second prong of the *Garner* test has not been established.

CONCLUSION

The Eighth Circuit Court of Appeals has misapprehended the substantive law set down in *Tennessee v. Garner*, 471 U.S. 1 (1985), in determining that the Respondent police officer acted reasonably, as a matter of law, when he shot and killed Leroy Krueger. The test set out by the Supreme Court requires a number of factual determinations which must exist independently. One cannot be imputed from the other. Facts which are essential to determining whether or not Officer Fuhr acted reasonably within the context of the Fourth Amendments "objective reasonableness" standard, remain in dispute. The Eighth Circuit's independent resolution of these disputes and determination that the unresolved disputes were immaterial, is in direct conflict with the Sixth Circuit's deference to the trier of fact in *Washington v. Newsom*, 977 F.2d 991 (6th Cir. 1992). To resolve this dispute between Circuits and to clarify the *Garner* tests for determining whether or not a police officer's use of deadly force upon a fleeing suspect is objectively reasonable within the context of the Fourth Amendment, the Writ should be granted.

Respectfully submitted,

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